

# ***Northwest Wholesale: Group Boycott Analysis and a Role for Procedural Safeguards in Industrial Self-Regulation***

In 1978, the Pacific Stationery and Printing Company (Pacific Stationery) was expelled from the membership of the Northwest Wholesale Stationers, Incorporated (Northwest Wholesale).<sup>1</sup> Pacific Stationery sells both retail and wholesale office supplies,<sup>2</sup> and Northwest Wholesale is a not-for-profit purchasing cooperative which purchases office supplies at substantial volume discounts and resells them, provides its members with wholesale storage facilities, and distributes its profits to its members.<sup>3</sup> This profit distribution lowers the price the members pay for Northwest's wholesale supplies and effectively constitutes a price discrimination in their favor.<sup>4</sup> The expulsion of Pacific Stationery was unaccompanied by any procedural safeguards and, as a result, Pacific Stationery lost access to the benefits of cooperative membership, including the cooperative's profit distributions.<sup>5</sup> Pacific Stationery brought suit against Northwest Wholesale, alleging a violation of the federal antitrust laws.<sup>6</sup>

Pacific Stationery alleged that expulsion from the trade association constituted a group boycott,<sup>7</sup> an activity generally illegal per se under the federal antitrust laws.<sup>8</sup> Northwest Wholesale, however, argued that its self-regulatory activities qualified for an exception to the per se rule against group boycotts.<sup>9</sup> Under the Supreme Court's

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1. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S. Ct. 2613, 2616 (1985).

2. *Id.* at 2615.

3. *Id.*

4. *Id.* at 2615 & n.2. Legally, price discrimination occurs when one buyer pays a different price from that paid by another buyer for goods of like grade and quality. In economic terms, price discrimination is present if the ratio of price to marginal cost differs from one sale to the next, and the seller earns different rates of return. H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 13.1 (1985). In *Northwest Wholesale*, the cooperative sold office supplies to retailers at a uniform price without regard to whether they were members or nonmembers. At the end of each year, however, the cooperative would distribute its profits "in the form of a percentage rebate on purchases." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2615 (1985). The effect of this practice was discriminatory pricing in favor of cooperative members. *Id.* at 2615 n.2. Price discrimination is generally contrary to the antitrust laws when it substantially lessens competition, but in the context of a cooperative profit distribution it is expressly allowed by Section Four of the Robinson-Patman Act. *Id.* at 2615 & n.2.

5. *See* 105 S. Ct. 2613, 2615-16 (1985). As the Ninth Circuit Court of Appeals noted, Pacific Stationery lost access to Northwest Wholesale's rebate policy, to Northwest Wholesale's "superior warehousing and expedited order-filling facilities," and to any benefits that are derived from being known as a member of "an established cooperative." *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393, 1395 (9th Cir. 1983), *rev'd*, 105 S. Ct. 2613 (1985).

6. 105 S. Ct. 2613, 2616 (1985). Pacific Stationery alleged a violation of Section One of the Sherman Act, which provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

7. 105 S. Ct. 2613, 2616 (1985).

8. *See* *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). *See generally* HOVENKAMP, *supra* note 4, at §§ 10.1-2.

9. As will be demonstrated, two inquiries are necessary in this regard. First, it must be determined whether Northwest Wholesale's activities constituted a group boycott warranting application of the per se rule. If no likelihood of anticompetitive effects is found, then the rule of reason would be appropriate. *See infra* notes 57-70 and accompanying text. Second, even if the per se rule applies, it must be determined whether the boycott nevertheless should be exempted from the per se rule under a partial repeal of the Sherman Act. In this case, the partial repeal would stem from a mandate

seminal antitrust opinion in *Silver v. New York Stock Exchange*,<sup>10</sup> industry self-regulation that might normally constitute a group boycott is removed from per se analysis if such regulation is exercised pursuant to a mandate of self-regulatory power.<sup>11</sup> Such a mandate can be either derived from a statute or found inherent in the structure of the industry.<sup>12</sup> The possible sources of Northwest Wholesale's mandate include the Robinson-Patman Act,<sup>13</sup> which expressly exempts profit distribution by trade associations from its prohibitions against price discrimination,<sup>14</sup> and the nature of trade associations in the competitive process.<sup>15</sup>

Pacific Stationery argued that an exercise of self-regulatory power by a trade association, resulting in a denial of the benefits of cooperative membership, should be considered per se illegal unless accompanied by procedural safeguards.<sup>16</sup> This procedural requirement apparently was derived from the Supreme Court's *Silver* opinion.<sup>17</sup>

Although the Ninth Circuit Court of Appeals found that the trade association had violated the Sherman Act,<sup>18</sup> the Supreme Court, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*,<sup>19</sup> unanimously concluded that the absence of procedural safeguards was not determinative<sup>20</sup> and that the cooperative's activity was not a group boycott warranting per se analysis.<sup>21</sup> The Court distinguished *Silver*'s requirement of due process by asserting that *Silver* had involved a broad statutory mandate for industry self-regulation and that no such mandate was provided by the Robinson-Patman Act.<sup>22</sup> Implicit in the Court's opinion is a refusal to require procedural safeguards when industry self-regulation is mandated by industry structure.<sup>23</sup>

This Comment will show that the Court's analysis unnecessarily compromises the effectiveness of the antitrust laws. The self-regulatory activities of Northwest Wholesale may have constituted a group boycott that, absent some intervening mandate of self-regulatory power, might warrant treatment as a per se violation of the Sherman Act.<sup>24</sup> Although the Robinson-Patman Act or the nature of trade associa-

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for self-regulation. See *infra* notes 71-111 and accompanying text.

10. 373 U.S. 341 (1963).

11. See *id.* at 360-61.

12. *Id.* at 348-49. See also *infra* note 15.

13. Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13, 13a, 13b, 21a (1982).

14. See *id.* at § 13b (1982). See also *supra* note 4.

15. The *Silver* opinion refers to the possible sources of a mandate for self-regulation as "statute or otherwise." *Silver v. New York Stock Exch.*, 373 U.S. 341, 348-49 (1963). The "or otherwise language" has been interpreted as including mandates required by an industry's structure. *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971). See also Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966).

16. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2616 (1985).

17. *Id.*

18. *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *rev'd*, 105 S. Ct. 2613 (1985).

19. 105 S. Ct. 2613 (1985).

20. *Id.* at 2619.

21. *Id.* at 2621.

22. *Id.* at 2618-19.

23. See *infra* note 211 and accompanying text.

24. See *infra* notes 157-84 and accompanying text.

tions might justify such activity and remove it from per se invalidation,<sup>25</sup> Northwest Wholesale or trade associations in general should not be allowed to do so in this instance because the powers they would sanction were employed without procedural safeguards.<sup>26</sup> Whenever an industry or market actor is authorized, whether by statute or otherwise, to engage in self-regulatory practices that normally constitute a group boycott in violation of the Sherman Act, the actor should be required to provide due process for those subject to the regulatory power. The Court in *Silver* recognized this principle, holding that self-regulatory concerted refusals to deal, when incidental to a partial repeal of the Sherman Act, were exempted from per se analysis only when accompanied by procedural safeguards.<sup>27</sup> Requiring procedural protection is an effective way to ensure a good faith use of the potentially anticompetitive powers conferred by a mandate for industry self-regulation.<sup>28</sup> Furthermore, the procedural safeguards will not restrict the potentially procompetitive effects that inspired the courts or Congress to recognize a partial exemption from the Sherman Act for self-regulation.<sup>29</sup>

## I. GROUP BOYCOTT ANALYSIS AND MANDATES FOR SELF-REGULATION

### A. *The Dual Standard of Antitrust Analysis*

The Sherman Act<sup>30</sup> was passed in 1890 to promote full and fair competition in the interstate and overseas commerce of the United States.<sup>31</sup> Various analysts have characterized the Act as a natural outgrowth of common law concerns with restraint of trade,<sup>32</sup> as a political response to the Populist and other agrarian political forces of the late nineteenth century,<sup>33</sup> as an effort to protect small business interests from rampant cartelization and monopolization,<sup>34</sup> and as an attempt to maximize consumer welfare.<sup>35</sup> Yet, whatever temporal conceptions Congress may have entertained as an immediate inspiration for the Sherman Act, the Act was given a broad, conceptual wording.<sup>36</sup> Its language has allowed courts and subsequent legislators to mold an operative substantive paradigm to protect competitive activity in the ever-evolving

25. See *infra* notes 185-86 and accompanying text.

26. See *infra* notes 185-220 and accompanying text.

27. *Silver v. New York Stock Exch.*, 373 U.S. 341, 364-65 (1963).

28. For a discussion of the benefits of process that were envisioned by the Court in *Silver*, see *id.* at 361-63.

29. See *id.*

30. 15 U.S.C. §§ 1-7 (1982).

31. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). See also *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978); I.E. KINTNER, *FEDERAL ANTITRUST LAW* (1980) (especially note 574 and accompanying text).

32. See, e.g., Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985).

33. See, e.g., H. THORELLI, *THE FEDERAL ANTITRUST POLICY: THE ORGANIZATION OF AN AMERICAN TRADITION* 58-60 (1955).

34. See, e.g., W. BAXTER, *THE POLITICAL ECONOMY OF ANTITRUST* (Robert D. Tollison ed. 1980).

35. See, e.g., Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW AND ECON. 7 (1966).

36. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) ("The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of the language, . . . the courts have been left to give content to the statute . . ."); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) ("[T]he Act has a generality and adaptability comparable to that found . . . in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.") See generally H. HOVENKAMP, *supra* note 4, at § 2.4.

marketplace.<sup>37</sup> Consequently, the Sherman Act retains its vitality and effectiveness today, almost a century after its enactment.<sup>38</sup>

Section One of the Sherman Act<sup>39</sup> prohibits contracts, combinations, and conspiracies in restraint of trade, while Section Two prohibits monopolization and attempts or conspiracies to monopolize.<sup>40</sup> The Act introduced a single federal antitrust paradigm, providing for both civil and criminal liability,<sup>41</sup> while previously only the various and occasionally inconsistent state laws had existed.<sup>42</sup> The Sherman Act, however, left to the federal courts the task of developing a specific framework for evaluating claims of violations,<sup>43</sup> and the courts have dutifully fashioned an operative system for the review of such claims.<sup>44</sup>

Vigorous enforcement of the Sherman Act was not immediate;<sup>45</sup> yet, amid a growing willingness in the federal courts of the early 1900s to enforce the Sherman Act,<sup>46</sup> "reasonability" was established as the standard of review in Section One cases.<sup>47</sup> Although this standard has its roots in the common law of trade restraints,<sup>48</sup> its interpretation has not been restricted to pre-existing common law principles of restraint of trade.<sup>49</sup> Instead, the courts have used the Congressional desire for full and fair competition as the standard in evaluating reasonableness.<sup>50</sup> The basic standard of reasonability has been supplemented with a second, special type of analysis involving activities that are presumptively unreasonable.<sup>51</sup> While most activities continue to

37. See *supra* note 36. See also *Sunny Hill Farms Dairy Co. v. Kraftco Corp.*, 381 F. Supp. 845, 853 (E.D. Mo. 1974) ("The drafters of the Sherman Act . . . could not have anticipated the modern American business complexities nor could they have foretold the plethora of ingenious methods . . . to avoid Section 1 of the Act. For this reason, the Act must be liberally construed and applied for the proper enforcement of its dictates.").

38. See H. HOVENKAMP, *supra* note 4, at § 2.4.

39. 15 U.S.C. § 1 (1982).

40. 15 U.S.C. § 2 (1982).

41. Sherman Act, 15 U.S.C. §§ 1-7 (1982).

42. I E. KINTNER, *supra* note 31, at § 4.18.

43. See, e.g., *Board of Trade v. United States*, 246 U.S. 231 (1918). In this early case, the Court explained that an assessment of an antitrust claim required more than just a determination that the act complained of restrained trade. The Court set out the "true test of legality" for the case and a list of the relevant facts in such a test. *Id.* at 238. See also remarks of Senator Sherman on March 21, 1890, 21 CONG. REC. 2460 (1890), admitting the difficulty of distinguishing in precise terms the distinction between procompetitive and anticompetitive combinations and adding that:

This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.

*Id.* See generally E. KINTNER, *supra* note 31; H. HOVENKAMP, *supra* note 4.

44. See *infra* notes 45-70 and accompanying text.

45. See H. THORELLI, *supra* note 33, at 560-63.

46. See *id.*

47. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). See also M. HANDLER, ANTITRUST IN PERSPECTIVE: THE COMPLEMENTARY ROLES OF RULE AND DISCRETION 3-28 (1957).

48. See *Standard Oil Co. v. United States*, 221 U.S. 1, 50-51 (1911) (wherein the Court, interpreting the terms of the Sherman Act, found it "certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the [Sherman Act]"). See also I E. KINTNER, *supra* note 31, at § 4.18; H. HOVENKAMP, *supra* note 4 at § 2.4.

49. See I E. KINTNER, *supra* note 31, at § 4.18. The Court has consistently noted that the standards "imposed by the Sherman Act are not mechanical or artificial" and that "each case demands a close scrutiny of its own facts." *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 597, 600 (1936). See *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

50. See *supra* note 31 and accompanying text.

51. When the courts encounter such activities, assertions of the reasonableness of the particular activity are immaterial because of the pernicious effect the activity has on competition in and of itself. See, e.g., *Northern Pac. Ry.*

involve an assessment of reasonableness, judicial experience with certain types of activity has found them so inherently violative of the antitrust laws that they are invalid without further inquiry.<sup>52</sup> Among those activities held to warrant per se invalidation are price-fixing,<sup>53</sup> tying-arrangements,<sup>54</sup> market-splitting agreements,<sup>55</sup> and group boycotts.<sup>56</sup>

### B. Group Boycott Analysis: Struggling with the Per Se Rule

The federal courts, in applying the per se standard to group boycott cases, have failed to develop a precise standard for finding group activities violative of the Sherman Act.<sup>57</sup> By definitional minimum, a group boycott involves an agreement, combination, or conspiracy among two or more parties to disadvantage a third party.<sup>58</sup> Yet not all definitional "group boycotts" have been treated as per se violations of the Sherman Act.<sup>59</sup> Recent decisions suggest that group boycotts are now analyzed under a hybrid of the rule of reason and per se standards.<sup>60</sup>

Early cases applied an analysis implicitly similar to the per se rule,<sup>61</sup> yet the applicability of the per se approach in group boycott cases did not fully mature until the Supreme Court's decision in *Klor's, Inc. v. Broadway Hale Stores, Inc.*<sup>62</sup> In

Co. v. United States, 356 U.S. 1, 11-12 (1958) (asserted harmlessness of tying arrangement not persuasive); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 467-68 (1941) (reasonableness of group boycott methods immaterial).

52. These activities are made subject to the per se approach when "judicial experience has shown that the class of arrangement under scrutiny is very harmful to competition." W. ANDERSON AND C. ROGERS, *ANTITRUST LAW: POLICY AND PRACTICE* 342-43 (1985) (emphasis in original). Particular arrangements within these classes, when brought before the courts, will be held illegal without inquiry into the particular circumstances. *Id.* See *supra* note 51 and accompanying text. See also *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.") (emphasis in original).

53. See *White Motor Co. v. United States*, 372 U.S. 253 (1963); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

54. See *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958).

55. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

56. See *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

57. L. SULLIVAN, *LAW OF ANTITRUST* 229-30 (1977); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685, 685-86 (1979); McCormick, *Group Boycotts—Per Se or Not Per Se, That is the Question*, 7 SETON HALL L. REV. 703, 765 (1976).

58. See H. HOVENKAMP, *supra* note 4, at § 10.1. A group boycott typically involves action by a group of traders in an effort to interfere with other traders in competition with the group. The effects are typically horizontal, yet a vertical element is also common. W. ANDERSON AND C. ROGERS, *supra* note 52, at § 4.06. For example, in *Northwest Wholesale*, the plaintiff could have asserted that the defendant—a combination of competing traders—was attempting to terminate its wholesale operations by effectively putting the plaintiff at a competitive disadvantage in purchasing wholesale supplies from the cooperative. As such, the effects of the boycott would ultimately be felt horizontally in the plaintiff's ability to compete, while the boycott itself involved an effort to use the vertical leverage of the cooperative to affect the plaintiff's business.

59. II E. KINTNER, *supra* note 31, at §§ 10.31-38. See also *infra* note 67 and accompanying text.

60. See *infra* notes 157-84 and accompanying text.

61. See, e.g., *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941) (refusing to consider the reasonableness of defendant's motives or purposes); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914) (nature of group boycotts put case in the class of undue and unreasonable restraints).

62. 359 U.S. 207 (1959). In *Klor's*, the competitors of a department store owner and the manufacturers and distributors of electric appliances allegedly conspired against the department store owner by refusing to deal at all or refusing to deal on equal terms. *Id.* at 209. The group actors sought dismissal of the complaint on the grounds that the

*Klor's*, the Court found that a concerted refusal to deal was illegal *by its nature*, despite assertions by the group that the anticompetitive effect was minimal.<sup>63</sup> Thereafter, a group boycott—when identified as such—was subject to invalidation *per se*.

Until recently, this somewhat inflexible approach to group boycotts was sustained by the Supreme Court.<sup>64</sup> Because it was perceived as overly restrictive, the *per se* rule against group boycotts generated dissatisfaction in the lower courts<sup>65</sup> and criticism from legal commentators.<sup>66</sup> Indeed, the lower courts developed a number of rationales to prevent the classification of various activities as group boycotts, thereby protecting them from *per se* invalidation.<sup>67</sup> Recently, the Court's position has begun to accommodate the concerns advanced in these commentaries and lower court decisions.<sup>68</sup> Before classifying an activity as a group boycott warranting *per se*

effects of the boycott were slight or nonexistent and that the prices, quantity, and quality were unaffected. *Id.* at 209–10. The Court rejected this justification, saying:

The Court recognized [in a previous case] that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their 'nature or character' were unduly restrictive . . .

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.

*Id.* at 211–12. While previous decisions had described group boycotts in terms of the *per se* rule, certain doubts and ambiguities remained. For a good discussion, see McCormick, *supra* note 57, at 725–26 & n.112. The *Klor's* decision cleared up doubts as to the Court's position. *Id.* at 726–27. See II E. KINTNER, *supra* note 31, at § 10.30.

63. See *supra* note 62.

64. See, e.g., *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); *United States v. General Motors Corp.*, 384 U.S. 127, 145, 146 (1966); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659–60 (1961) (*per curiam*). See also Bauer, *supra* note 57, at 686–92.

65. The dissatisfaction of the lower courts with the *per se* rule in the group boycott context is evident in the numerous decisions refusing to invalidate activities that are, by all appearances, group boycotts. See *infra* note 59.

66. See, e.g., sources cited *supra* note 31. See also Comment, *A Reexamination of the Boycott Per Se Rule in Antitrust Law*, 48 TEMP. L.Q. 126 (1974).

67. The discomfort of the lower courts is made evident by their frequent willingness to prevent reasonable, concerted activity from being declared *per se* illegal. As one court has warned, "[T]o outlaw certain types of business conduct merely by attaching the 'group boycott' and 'per se' labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed." *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119, 125 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974). Among the decisions refusing to declare a group boycott *per se* illegal are: *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1367–68 (5th Cir. 1980) (though group boycott was present in exclusion of real estate brokers from multiple listing service, *per se* rule was inapplicable where group boycott was reasonable response to "pervasive market imperfections"); *Phil Tolkman Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc.*, 672 F.2d 1280, 1285–86 (7th Cir. 1982) (though group boycott occurred when dealer was excluded from cooperative membership, *per se* rule was inapplicable in context of trade association membership where necessity to effective competition not demonstrated).

A more comprehensive analysis of this subject is beyond the scope of this Comment, but may be found in II E. KINTNER, *supra* note 31, at §§ 10.31–38 (1980), and McCormick, *supra* note 57, at 737–64.

68. See Brunet, *Streamlining Antitrust Litigation by 'Facial Examination' of Restraints: The Burger Court and the Per Se - Rule of Reason Distinction*, 60 WASH. L. REV. 1, 27 (1984) (asserting that the Burger Court has blurred the distinction between *per se* and rule of reason standards by adding elements of the rule of reason approach in a preliminary "facial examination" in *per se* cases); see *infra* notes 66–67 and accompanying text. See also *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 216 (D.C. Cir. 1986) ("The Supreme Court has now made explicit what had always been understood . . . [T]he *per se* illegality of all boycotts has now been squarely rejected."); *Phil Tolkman Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc.*, 672 F.2d 1280, 1284 (7th Cir. 1982) ("In its more recent antitrust decisions, the Supreme Court has cautioned against overzealous application of the *per se* doctrine.").

A few of the Court's recent decisions illustrate this recent trend. In *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978), four malpractice insurance companies were sued for a concerted refusal to deal. *St. Paul Fire*, in order to reduce the coverage offered to physicians, induced its competitors to refuse to deal with *St. Paul's* policyholders. The principle question before the Court was whether the alleged boycott was a "boycott" under the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011–15 (1982). This Act permits the states to regulate the insurance business free of the *Sherman Act*.

analysis, many federal courts, including the Supreme Court, conduct facial analyses of the underlying intent and surrounding circumstances of a group boycott.<sup>69</sup> As a result, per se invalidation of a group boycott now requires a preliminary confirmation of a likelihood of predominantly anticompetitive consequences.<sup>70</sup>

### C. Exceptions to the Per Se Rule: Partial Repeals and Self-Regulatory Mandates

Even if an activity would normally constitute a per se violation of the Sherman Act, Congress and the federal courts have been willing to create exceptions to the regular standards of antitrust analysis when they have perceived the exception likely to enhance competition or effectuate some related policy.<sup>71</sup> These exceptions—or partial repeals—may be express or implied by statute,<sup>72</sup> or they may be recognized by the courts as inherently consistent with antitrust policy.<sup>73</sup> Creation of an exception to

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However, the Sherman Act still applies in cases of agreements to boycott, coerce, or intimidate. 15 U.S.C. § 1013 (b) (1982). After determining that Congress used the term "boycott" with its "tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act," the Court made the statement: "[T]he issue before us is whether the conduct in question involves a boycott, not whether it is per se unreasonable." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541–42 (1978). Although the Court ultimately decided that the boycott was illegal, the scope of the per se rule against boycotts had clearly been questioned. *Id.* at 544–45.

In *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984), the Court found an exclusive football telecasting plan violative of the Sherman Act under the rule of reason. Significantly, the Court declined to apply the per se rule, as the Circuit Court had done, and did not even consider the group boycott doctrine, as the District Court had done. *See id.* at 97 & n.13. After deciding the case under the rule of reason, the Court asserted that both standards involve the same "ultimate focus." *Id.* at 103. In a footnote, the Court made the statement: "Indeed, there is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." *Id.* at 104 n.26. The implication is clear that the per se rule may not always be applicable without further inquiry. Rigid, doctrinal application of the per se standard is to be avoided.

Still another example of the Court's current pragmatic approach to the per se rules is *Northwest Wholesale* itself. *See infra* notes 130–51 and accompanying text.

69. *See, e.g.,* *MacHovec v. Council for the Nat'l Register of Health Serv. Providers in Psychology, Inc.*, 616 F. Supp. 258, 269–72 (E.D. Va. 1985). *See Brunet, supra* note 68, at 27.

70. *See, e.g.,* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2620 (1985) (those boycotts that are per se forbidden exhibit a "likelihood of predominantly anticompetitive consequences").

71. The court-fashioned exemptions have taken various forms and rationales. *See, e.g.,* *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) ("no violation of the [Sherman] Act can be predicated on mere attempts to influence the passage or enforcement of laws"); *Parker v. Brown*, 317 U.S. 341, 350–51 (1943) ("nothing in the language of the Sherman Act . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature"); *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922) (organized baseball not subject to Sherman Act because it has no effect on interstate commerce).

Congress has also expressly fashioned exemptions and immunities in various ways and means. For example, the Clayton Act made antitrust laws inapplicable to labor organizations. 15 U.S.C. § 17 (1982). The "business of insurance," except for acts of boycott, coercion, or intimidation, was exempted from the antitrust laws to the extent that state regulation was involved. *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011–15 (1982). A limited antitrust exemption is also provided for agricultural cooperatives to organize, exchange data, and fix prices. *See the Clayton Act*, 15 U.S.C. § 17 (1982); the *Capper-Volstead Act*, 7 U.S.C. §§ 291–92 (1982). *See generally* III H. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES (1949).

72. Congressional legislation can repeal portions of Sherman Act analysis expressly, if the language of the statute makes the partial repeal clear, or implicitly, if the statutory purpose requires some repeal power over regularly applicable principles. An example of an express partial repeal is Section Four of the Robinson-Patman Act, which expressly exempts cooperative profit distributions from its prohibitions against price discrimination. 15 U.S.C. § 13b (1982). An example of an implied repeal is the mandate in the Securities Exchange Act for exchange self-policing. 15 U.S.C. §§ 78f(b), 78f(d) (1982). These provisions were interpreted in *Silver* as justifying activities that might otherwise have violated the Sherman Act. This partial repeal was recognized despite the fact that "no express exemption from the antitrust laws" was found in the statute. *Silver v. New York Stock Exch.*, 373 U.S. 341, 357, 360–61 (1963).

73. The characteristics of a particular market or industry structure may lead the Court to recognize an immunity to

the Sherman Act, however, will always be motivated by the competitive needs of the particular industry or of the business organization in the context of its particular market.

Congress, for example, has made numerous efforts to enhance the effectiveness of antitrust policy since the Sherman Act was enacted.<sup>74</sup> Many federal statutes deal with particular markets<sup>75</sup> or concerns,<sup>76</sup> and many create exemptions from the broad antitrust principles that they codify or that the Sherman Act embraces.<sup>77</sup> While the exemption usually will be explicit, a statute will occasionally contradict the antitrust laws without expressly repealing them.<sup>78</sup> These exceptions have been treated by the federal courts as implied partial repeals of the Sherman Act.<sup>79</sup> Courts typically interpret this repeal power narrowly when confronted with a conflict with the Sherman Act, in light of the implicit rather than explicit nature of the repeal.<sup>80</sup> Indeed, whether the exception is statutory or court-recognized, some measure of rule of reason analysis will most likely still be appropriate.<sup>81</sup>

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some antitrust rules. For example, the Court has held that the mere attempt to influence passage of legislation or enforcement of laws cannot give rise to an antitrust claim. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

74. Since the enactment of the Sherman Act in 1890, several specific concerns have necessitated legislative treatment. A complete discussion of these is unnecessary for purposes of this Comment. Instead, a few examples will serve to illustrate Congress' continued role in the development of antitrust policy. One such example is the Clayton Act, which was enacted in 1914 in an effort to treat certain practices at their inception—rather than consummation—if they were substantially likely to create an anticompetitive effect. See 15 U.S.C. §§ 12, 13, 14–19, 20, 21, 22–27, 44 (1982); F. JONES, *TRADE ASSOCIATION ACTIVITIES AND THE LAW* 8 (1922). The Clayton Act was less amorphous than the Sherman Act, expressly dealing with mergers, exclusive-dealing arrangements, interlocking directorships, and other specific concerns. See II H. TOULMIN, *A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES* § 1.6 (1949).

The Federal Trade Commission Act is another example of a post-Sherman Act supplement to the antitrust laws. See 7 U.S.C. § 610, 15 U.S.C. §§ 41–58 (1982). This Act granted the Federal Trade Commission broad powers to declare trade practices unfair. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320–21 & n.3 (1966). Still another example is the Robinson-Patman Act of 1936, which revised and supplemented prior law on the subject of price discrimination. See 15 U.S.C. §§ 13–13b, 21a (1982).

75. See, e.g., McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (1982), which deals solely with antitrust principles in the insurance business.

76. See, e.g., Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13–13b, 21a (1982), which deals with price discrimination without regard to any one industry or market.

77. See *supra* note 71.

78. See *infra* notes 79–81 and accompanying text. In *Silver v. New York Stock Exchange*, the Court, in discussing a conflict between the Securities Exchange Act and the antitrust laws, said: "The Securities Exchange Act contains no express exemption from the antitrust laws . . . . This means that any repealer of the antitrust laws must be discerned as a matter of implication." 373 U.S. 341, 357 (1963). The Court was willing to imply such exemptions, but only to the extent necessary to effectuate the purposes of the Securities Exchange Act. *Id.* But see *United States v. Borden Co.*, 308 U.S. 188, 201 (1939) (the Court refused to imply immunity beyond that which had been expressly granted in the Agricultural Marketing Agreement Act).

79. See, e.g., *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

80. *Id.*; see also *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962) ("Immunity from the antitrust laws is not lightly implied."); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456–57 (1945) ("[I]t is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy."); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("It is a cardinal principle of construction that repeals by implication are not favored.").

81. When the federal courts confront a partial repeal of the Sherman Act, they still must consider those antitrust principles that have not been ousted. In *Silver*, for example, the Court attempted to reconcile the Sherman Act with the Securities Exchange Act in order to discern the degree to which the Sherman Act had been repealed. 373 U.S. 341, 357 (1963).



### 1. Self-Regulatory Mandates and Group Boycotts

In the context of the per se rule against group boycotts, one type of partial repeal that has been recognized is a mandate for industry self-regulation.<sup>82</sup> Certain industries and business organizations are necessarily allowed to create and enforce reasonable rules of self-government in order to fully benefit the competitive process.<sup>83</sup> These regulatory activities may have all of the characteristics of an illicit group boycott that would normally be invalid per se, yet the nature of the industry will necessitate the more flexible analysis of the rule of reason.<sup>84</sup> Mandates for self-regulation can be embodied in statutes<sup>85</sup> or simply recognized by the courts as inherently consistent with full and fair competition.<sup>86</sup>

The Court was confronted with this type of repeal in *Silver v. New York Stock Exchange*.<sup>87</sup> In *Silver*, an over-the-counter dealer in municipal bonds asserted that the New York Stock Exchange had violated Sections One and Two of the Sherman Act by terminating his private wire connections with Exchange members without providing him with procedural safeguards.<sup>88</sup> The wire connections, an important service in the securities market,<sup>89</sup> were subject to the regulation and control of the various exchanges by the Securities Exchange Act.<sup>90</sup> The bylaws created by the Exchange pursuant to the Securities Exchange Act did not provide procedural protections for the governed members,<sup>91</sup> and the plaintiff in *Silver* was disconnected without prior notice or a hearing.<sup>92</sup>

The Court in *Silver* first determined that the activity would, absent other federal regulation,<sup>93</sup> constitute a group boycott in restraint of trade.<sup>94</sup> Thus, the activity would have been a per se violation of the Sherman Act.<sup>95</sup> However, the Securities Exchange Act of 1934 granted the Exchange certain self-regulatory powers,<sup>96</sup> including the right to govern relations between members and non-members.<sup>97</sup> Nothing in the Securities Exchange Act, however, entirely excluded the Exchange's activities from the scope

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82. See, e.g., *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

83. See *id.*; *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2620 (1985) ("Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively.").

84. As the Court noted in *Silver*, "[U]nder the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." 373 U.S. 341, 360 (1963).

85. See *supra* note 71.

86. *Id.*

87. 373 U.S. 341, 357 (1963).

88. *Id.* at 345.

89. *Id.* at 348.

90. *Id.* at 352. See Securities Exchange Act, 15 U.S.C. §§ 77b-77e, 77j, 77k, 77m, 77o, 77s, 78a *et seq.* (1982).

91. 373 U.S. 341, 355 n.11 (1963).

92. *Id.* at 344.

93. In this case, the Securities Exchange Act, 15 U.S.C. § 78f. See *supra* notes 71-81 and accompanying text.

94. 373 U.S. 341, 347 (1963).

95. The Court noted, "It is plain . . . that the removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of § 1 of the Sherman Act." *Id.* at 347 (emphasis added).

96. See Securities Exchange Act, 15 U.S.C. § 78f(b), (d) (1982).

97. *Id.*

of the antitrust laws,<sup>98</sup> and the Court determined that the grant of self-regulatory power in the Securities Exchange Act should not be interpreted as repealing the Sherman Act beyond the extent necessary to accomplish the legislative goals of the provision.<sup>99</sup> Therefore, although per se invalidation of the group boycott was inappropriate, an assessment of reasonability under the Sherman Act was nonetheless required. Even if the Exchange operated pursuant to its mandate for self-regulation, unreasonable activities to the detriment of full and fair competition would be illegal under the Sherman Act.

## 2. Self-Regulatory Mandates and the Reasonability of Process

Next, the Court in *Silver* found that the grant of self-regulatory power in the Securities Exchange Act did not justify the Exchange's refusal to grant a hearing and explanation to the plaintiff.<sup>100</sup> Indeed, the Securities Exchange Act's underlying concerns with fair dealing and the protection of securities investors<sup>101</sup> were compromised by the denial of process.<sup>102</sup> By imposing a requirement of procedural fairness, the Court intended to prevent violations of the antitrust laws by actors who deviate from the legislative or other purpose underlying an authorization of self-regulatory power.<sup>103</sup> Hence, although the self-regulatory boycott in *Silver* was not invalidated under the per se rule, the denial of procedural protections was unreasonable.

The *Silver* decision implies that when, for example, a federal statute specifically or implicitly allows an activity that might otherwise constitute a violation of the antitrust laws, the activity is tolerable to the extent necessary to effectuate the underlying legislative purpose.<sup>104</sup> However, a statute that permits a group to exercise self-regulatory power—with the aim of benefiting the competitive process—does not sanction an arbitrary or unfair use of those powers in derogation of full and fair competition.<sup>105</sup> In group boycott cases, the procedural requirement is intended to guarantee that a mandated power of regulatory activity is not used arbitrarily and to provide a basis for judicial review.<sup>106</sup> Under *Silver*, self-regulatory activity that would normally constitute a group boycott warranting per se invalidation might survive Sherman Act analysis when three conditions are met.<sup>107</sup> First, there must be

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98. The Court noted, "[I]t does not follow that . . . since the Exchange has a general power to adopt rules governing its members' relations with nonmembers, particular applications of such rules are therefore outside the purview of the antitrust laws." 373 U.S. 341, 357 (1963).

99. *Id.*

100. *Id.* at 361.

101. *Id.*

102. *Id.* at 361–63.

103. *Id.* at 364–65. See also *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1065 (C.D. Cal. 1971).

104. See *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

105. See *id.* at 364.

106. *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1065 (C.D. Cal. 1971).

107. *Id.* at 1064–65.

a mandate, legislative or otherwise,<sup>108</sup> for industry self-regulation.<sup>109</sup> Second, the collective activity must be reasonably designed to accomplish an end consistent with the policy motivating the mandate.<sup>110</sup> Third, procedural safeguards must be provided.<sup>111</sup>

## II. *Northwest Wholesale*

### A. *The Expulsion of Pacific Stationery from the Trade Association*

In *Northwest Wholesale*,<sup>112</sup> the courts were confronted with a retailer's expulsion, unaccompanied by procedural safeguards, from a non-profit trade association.<sup>113</sup> Northwest Wholesale, a wholesale purchasing cooperative composed of office supply retailers in the Pacific Northwest, sells its supplies to both member and non-member retailers.<sup>114</sup> At the end of each year, Northwest Wholesale distributes its profits to its members, resulting in a significantly lower cost for members purchasing from the association.<sup>115</sup> Arguably, this practice is a form of price discrimination,<sup>116</sup> yet it is specifically authorized by Section Four of the Robinson-Patman Act.<sup>117</sup> Northwest Wholesale also provides its members with wholesale storage facilities, giving them certain economies of scale that otherwise would be unavailable.<sup>118</sup>

The membership of the cooperative was governed by a set of bylaws, two of which were especially relevant to the dispute. Since 1974, Northwest Wholesale prohibited its individual members from engaging simultaneously in both retail and wholesale operations.<sup>119</sup> Another bylaw obligated members to bring changes in the ownership of a controlling share of stock to the attention of the membership.<sup>120</sup> Pacific Stationery, a member of the cooperative since 1958, continued to engage in both retail and wholesale operations despite the cooperative's disapproval.<sup>121</sup> A grandfather clause secured their right to continue both operations after the enactment of the bylaw.<sup>122</sup> Pacific Stationery failed, however, to bring a change in stock

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108. *Id.* Language in *Silver* indicated that the mandate could be legislative or otherwise. Thus, a relevant power of self-regulation can be one granted expressly or impliedly in a statute, or it can be "inherently required by the market's structure." *Id.* at 1064. See also Note, *supra* note 15, at 1488-97 (discussing the self-regulatory powers of trade associations, and the sources of these powers, in light of *Silver*).

109. 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971).

110. *Id.* at 1065.

111. *Id.*

112. *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *rev'd*, 105 S. Ct. 2613 (1985).

113. *Id.* at 2616.

114. *Id.* at 2615.

115. *Id.*

116. See *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393, 1395 (9th Cir. 1983) ("In other circumstances, it would be plausible to interpret such a situation as a price discrimination.") See *supra* note 4 and accompanying text. The Robinson-Patman Act provides the source of the exemption for cooperative profit distribution from consideration as price discrimination. See *infra* note 117 and accompanying text. Cf. III E. KINTNER AND J. BAUER, *FEDERAL ANTITRUST LAW* § 19.14 (1983).

117. 15 U.S.C. § 13b (1982).

118. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2615 (1985).

119. *Id.* at 2616.

120. *Id.*

121. *Id.*

122. *Id.*

ownership to the official attention of the cooperative, thereby violating the bylaw governing that subject, and the membership voted to expel Pacific in 1978.<sup>123</sup>

Pacific Stationery contended that the expulsion was motivated by Pacific's continued maintenance of wholesale operations,<sup>124</sup> while Northwest Wholesale claimed that its motivation was Pacific's failure to notify the cooperative of the change in stock ownership.<sup>125</sup> The actual motivation for the expulsion is not apparent from the record,<sup>126</sup> and the nature and scope of the competitive injury to Pacific is also uncertain.<sup>127</sup> Pacific Stationery brought suit in federal district court in Oregon,<sup>128</sup> claiming that the expulsion of Pacific constituted a violation of the antitrust laws.<sup>129</sup>

#### B. Northwest Wholesale: *Applying Antitrust Principles*

The United States District Court for the District of Oregon rejected the applicability of the per se rule, found no basis for an invalidation under the rule of reason, and granted summary judgment for Northwest Wholesale.<sup>130</sup> On appeal, the Ninth Circuit Court of Appeals reversed this decision,<sup>131</sup> holding that the lack of procedural safeguards prevented Northwest Wholesale from qualifying for "the narrow rule of reason exception to the usual per se rule against group boycotts."<sup>132</sup> The United States Supreme Court, in an opinion written by Justice Brennan, reversed the Circuit Court's decision and remanded the case for a review of the District Court's rule of reason analysis.<sup>133</sup> In reaching this result, the Court first dismissed the applicability of the *Silver* due process requirement<sup>134</sup> and then held that the boycott of Pacific Stationery did not warrant application of the per se rule.<sup>135</sup> In each instance, the Court was responding to the inequities of a rigid per se approach to group boycotts, yet in each case, the Court may have gone too far.

Turning first to the issue of procedural safeguards, the Court was confronted with its own decision in *Silver*.<sup>136</sup> In *Silver*, the Court had found an implied partial repeal of the Sherman Act, insofar as the Sherman Act would limit the self-regulation of a securities exchange, necessary to effectuate the goals of the Securities Exchange Act.<sup>137</sup> The policy disfavoring repeals by implication had led the Court to narrow the permissible self-policing activities to those which both further the goals of the grant of power and include procedural protection.<sup>138</sup> The Robinson-Patman Act, which

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* See also *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393 (9th Cir. 1983), *rev'd*, 105 S. Ct. 2613 (1985).

132. *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393, 1398 (9th Cir. 1983).

133. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2621-22 (1985).

134. *Id.* at 2619.

135. *Id.* at 2621.

136. *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

137. See *supra* notes 96-99 and accompanying text.

138. *Id.*

grants cooperatives the power to distribute profits and effectively conduct price discrimination,<sup>139</sup> inherently subjects the use of the power to the self-regulatory activities of the cooperatives.<sup>140</sup> It implicitly insulates self-regulatory control of the benefits of profit distribution from the normally applicable Sherman Act analysis and, as such, seems analogous to the Securities Exchange Act in *Silver*. But the Court distinguished *Silver*, holding that the Robinson-Patman Act does not provide the "broad mandate for industry self-regulation"<sup>141</sup> that had been present in *Silver*.

The Court next addressed the question of whether the decision to expel Pacific Stationery was a group boycott warranting per se invalidation.<sup>142</sup> Noting the confusion surrounding the applicability of the per se rule to group boycotts,<sup>143</sup> the Court used care in defining the type of group boycott warranting the per se rule.<sup>144</sup> The Court noted that the per se approach is typically applied when a group has disadvantaged a competitor by denying it relationships necessary in the competitive struggle.<sup>145</sup> The Court noted that boycotts in these cases often involve a needed market, facility, or supply that is controlled by a group of firms possessing a dominant position in the relevant market.<sup>146</sup> Also common is a lack of evidence of procompetitive effects.<sup>147</sup> The Court found that, although all of these indicators need not be present for a per se invalidation, a likelihood of predominantly anticompetitive consequences must be established.<sup>148</sup>

In analyzing the expulsion of Pacific Stationery, the Court found no basis for implying anticompetitive effects or animus.<sup>149</sup> Furthermore, there had been no threshold showing by Pacific that the cooperative possessed the market power necessary to disadvantage Pacific.<sup>150</sup> Thus, the Court determined that the rule of reason approach of the District Court was proper.<sup>151</sup>

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139. See *supra* notes 115-17 and accompanying text.

140. *Id.*

141. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2619 (1985). The Court, in a comparison of the Securities Exchange Act and the Robinson-Patman Act, found that the self-policing provisions of the former were not comparable to the latter's "narrow immunity." *Id.* at 2618. The Court held that the Robinson-Patman Act's exemption for cooperative profit distribution "cannot plausibly be construed as an exemption to or repeal of any portion of the Sherman Act." *Id.* at 2618-19 (footnote omitted).

Pacific Stationery, however, did not contend that the cooperative's profit distributions required an application of the per se analysis. Instead, the concerted activity of the cooperative was asserted to be a group boycott. *Id.* at 2616. Thus, the Act's authorization of profit distribution is not the source of the alleged violative activity. Rather, the self-regulatory powers attending the right of a cooperative to distribute profits and govern members were the sources of an alleged group boycott in restraint of trade.

142. *Id.* at 2619.

143. *Id.* In discussing the parameters of the group boycott category, the Court noted, "Exactly what types of activity fall within the forbidden category is, however, far from certain." *Id.* The Court, quoting Professor Sullivan, stated that "[t]here is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine." *Id.* (quoting from L. SULLIVAN, *LAW OF ANTITRUST* 229-30 (1977)). See *supra* note 57 and accompanying text.

144. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2619 (1985).

145. *Id.*

146. *Id.*

147. *Id.* at 2620.

148. *Id.*

149. *Id.* at 2620-21.

150. *Id.* at 2621.

151. *Id.*

### C. Northwest Wholesale: *Implications of the Court's Opinion*

The Court's treatment of the issues in *Northwest Wholesale* presents a number of problems. In terms of form, it is surprising that the procedural safeguards issue was treated before the group boycott was assessed. The procedural safeguards required by *Silver* would be irrelevant unless there was a group boycott which, absent some mandate of self-regulatory power, would warrant per se invalidation.<sup>152</sup> In light of the subsequent determination that the group boycott at issue was not one warranting application of the per se rule,<sup>153</sup> discussion of the *Silver* due process rule seems unnecessary.

In terms of its implications for antitrust analysis, the Court's opinion is even more disturbing. The Court's harsh rejection of the procedural safeguards requirement of *Silver* severely limits the scope of a rule that is significant in preserving good faith in the use of potentially anticompetitive self-regulatory power.<sup>154</sup> In addition, the Court's analysis of the group boycott may have unduly distorted the standards for the evaluation of such boycotts.<sup>155</sup> Although the Court was justifiably concerned with avoiding a per se invalidation without some threshold assessment of the likelihood of anticompetitive consequences, the threshold analysis employed by the Court may have undercut the value of the per se rule's use in group boycott cases.<sup>156</sup> This Comment will first suggest a more appropriate adaptation of the per se approach to group boycotts and will then discuss an appropriate role for procedures in mandated self-regulatory activities.

## III. ADAPTING THE PER SE RULE TO GROUP BOYCOTT ANALYSIS

### A. *The Goals of the Reformation*

The courts have determined that the group boycott is generally a type of activity which is so inherently anticompetitive that a presumption of invalidity is justified.<sup>157</sup> Thus, group boycotts have been deemed per se invalid and have received the harsh treatment of per se analysis since several early decisions.<sup>158</sup> Some group exclusionary activities, however, can enhance competition significantly.<sup>159</sup> If merely bearing the label "group boycott" is allowed to determine legality, otherwise procompetitive

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152. See *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971). See also *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

153. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2621 (1985).

154. See *infra* notes 185-220 and accompanying text.

155. See *infra* notes 157-84 and accompanying text.

156. The Court's concern with misapplication of per se rules is reflected in its requirement of a "satisfactory threshold determination whether anticompetitive effects would be likely." 105 S. Ct. 2613, 2621 (1985). Reversing the Circuit Court's approach, the Court asserted, "It does not denigrate the *per se* approach to suggest care in application." *Id.* at 2621-22 (emphasis added).

157. See *supra* notes 52, 56 and accompanying text.

158. See *supra* note 56 and accompanying text.

159. See, e.g., Bauer, *supra* note 57. Professor Bauer identifies three situations that will justify a group boycott in an industry: (1) a need in the industry for the elimination of some competition, (2) societal benefits of a group boycott outweighing competitive injuries of a group boycott, and (3) a group boycott that is neutral in its effect. *Id.* at 699.

activities could be suppressed under the Sherman Act. This unfortunate result obviously would be inconsistent with federal antitrust policy.

Concern with the overbreadth of a strict *per se* approach is leading the federal courts to adopt a more flexible approach with respect to group boycotts.<sup>160</sup> Today, not only must a group activity constitute a group boycott, but it must also involve a "likelihood of predominantly anticompetitive consequences"<sup>161</sup> in order to be subjected to the *per se* standard.<sup>162</sup> In determining whether a group boycott is one warranting application of the *per se* rule, a preliminary analysis of the activity is required.<sup>163</sup>

A benefit of a required facial analysis is that it allows preservation of many of the benefits of the *per se* rule. Furthermore, it may return to group boycott analysis some of the flexibility needed to effectively serve antitrust policy.<sup>164</sup> The *per se* rule, though criticized as occasionally "paint[ing] with a broad brush"<sup>165</sup> to bring about an anticompetitive result, provides the significant advantages of providing industry with a clear standard and allowing courts to avoid extensive inquiries into the intents and effects of commercial activity.<sup>166</sup> The rule of reason, by contrast, presents certain disadvantages that the *per se* approach successfully avoids. For example, while the rule of reason allows a court to evaluate the evils and benefits of a certain activity on a case-by-case basis,<sup>167</sup> thus minimizing the risk of prohibiting a procompetitive activity, courts have been justifiably hesitant to "ramble through the wilds of economic theory"<sup>168</sup> to evaluate reasonability. Rule of reason analysis carries with it the specter of complex, costly, and extensive litigation,<sup>169</sup> as well as uncertainty as to result.<sup>170</sup> Thus, while the scope of the *per se* rule may have been

160. See *supra* notes 67-70 and accompanying text.

161. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2620 (1985).

162. *Id.* at 2620-21.

163. *Id.* The Court, in denying applicability of the *per se* rule, noted that at no time had Pacific made a "threshold showing" of the likelihood of anticompetitive consequences. *Id.* at 2621. See *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353, 355-56 (5th Cir. 1986) (affirming a district court's conduct of such a threshold analysis.). See also *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984) ("*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.>").

164. See Bauer, *supra* note 57. Professor Bauer asserts that modification of the rigid application of the *per se* rule to all group boycotts is necessary. Under this theory, by assessing the group's intent and the likelihood of anticompetitive effects before applying the rule, the Court could prevent misapplication of the *per se* rule by allowing courts to use the rule of reason standard where the *per se* approach is not justified.

165. See *supra* notes 57-63 and accompanying text.

166. See *infra* notes 167-68. See also F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 438-43 (1970).

167. See generally II E. KINTNER, *supra* note 31, at § 8.2.

168. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972).

169. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982) ("The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs."). That antitrust litigation can be complex and costly is fairly well recognized. As one author writes, "understanding the antitrust implications of commercial facts, managing the necessary discovery and marshalling the enormous quantity of evidence for use in antitrust trials are very substantial undertakings for the neophyte lawyer." C. HILLS, *ANTITRUST ADVISER* 652-53 (3d ed. 1971). See generally J. GREENFIELD AND M. MALINA, *ANTITRUST LITIGATION* (1985).

170. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972) ("Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.") (emphasis added). One author notes:

One of the major frustrations of business persons and their lawyers (and no doubt judges as well) is what might be termed the uncertainty factor in antitrust law. Particularly in the gray areas where conflicting policies overlap,

overly broad in some past applications,<sup>171</sup> efforts to restructure group boycott analysis should be careful not to displace the rule unnecessarily.

Assuming that a reformation of the per se approach to group boycotts is appropriate, the reform should be careful to preserve the benefits of the per se rule when they outweigh the disadvantages. Admittedly, some alleged group boycotts may involve an absence of anticompetitive intent or effects, warranting the increased pragmatism that has characterized some recent cases. A preliminary inquiry into the likelihood of predominantly anticompetitive consequences can be used to segregate those group boycotts that are the exceptions to the norm. But this inquiry should not be too rigorous. In general, group boycotts have been found to have a pernicious effect so often as to warrant a presumption of invalidity.<sup>172</sup>

### B. *The Current State of the Reformation*

Unfortunately, the analyses of group boycotts found in recent court decisions employ no such presumption of invalidity. Instead, they require that a preliminary demonstration by the plaintiff confirm the likelihood of anticompetitive consequences.<sup>173</sup> By placing this burden on the plaintiff, this approach attenuates the underlying philosophy of per se analysis. Group boycotts have been subjected to per se invalidation because of the overwhelming likelihood of anticompetitive consequences.<sup>174</sup> In assessing the applicability of the per se rule to a group boycott, a court should presume anticompetitive consequences. In conducting a facial examination of the group boycott, the court should scrutinize the defendant's efforts to rebut this presumption instead of assessing the strength of the arguments of the boycotted party that confirm the presumption.

In *Northwest Wholesale*, for example, the Court looked for a showing by the plaintiff that the group boycott would have anticompetitive results.<sup>175</sup> In doing so, it undercut a presumption necessary to the effective operation of the per se rule. The Court found that Pacific Stationery had made no threshold showing that the cooperative had access to "an element essential to effective competition."<sup>176</sup> The Court found that Pacific's assertions that the expulsion from the cooperative was motivated by Pacific's refusal to cease wholesale operations were more "appropriately evaluated under the rule of reason analysis."<sup>177</sup> Although noting that

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it is at times exceedingly difficult to draw clear boundaries between lawful cooperation and unlawful collaboration, or between lawful competition and unlawful predation.

P. JONES, LITIGATING PRIVATE ANTITRUST ACTIONS § 1.04 (1984).

171. *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1064 (C.D. Cal. 1971) ("[B]y its very nature the per se approach paints with a very broad brush and eliminates economic cooperation which may be both necessary and desirable.").

172. See *infra* notes 175-82 and accompanying text.

173. See, e.g., *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353, 355-56 (5th Cir. 1986); *Rickards v. Canine Eye Registration Found., Inc.*, 783 F.2d 1329, 1332-33 (9th Cir. 1986); *MacHovec v. Council for the Nat'l Register of Health Serv. Providers in Psychology, Inc.*, 616 F. Supp. 258, 269-72 (E.D. Va. 1985).

174. *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

175. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2621 (1985).

176. *Id.*

177. *Id.* at 2620 n.7.



“[s]uch a motive might be more troubling,”<sup>178</sup> the Court confined its analysis to the assertion that the stock disclosure bylaw was the reason for the expulsion.<sup>179</sup> The inference is that Pacific’s failure to confirm a likelihood of anticompetitive effects or motives, rather than any showing by Northwest Wholesale to refute a presumptive likelihood of anticompetitive effects, justified the removal of the group boycott from the per se rule.<sup>180</sup> Yet Pacific Stationery had made plausible assertions that the expulsion from the cooperative was motivated by questionable intentions,<sup>181</sup> and Pacific had lost access to Northwest’s wholesale facilities and profit distributions.<sup>182</sup> Thus, anticompetitive motives and effects had been asserted by Pacific Stationery in the context of this boycott. If a group acts, as they did in this case, to exclude a competitor from services and benefits, plausible assertions of anticompetitive animus and effects should be accorded more weight.

### C. A More Appropriate Alternative

The logical approach to group boycott analysis would be to allow the defendants to rebut a presumed likelihood of anticompetitive consequences. If the boycotted party demonstrates the presence of a group boycott and asserts a plausible anticompetitive effect or motivation for the boycott, a rebuttable presumption of per se illegality should arise. The group boycott should be held to the per se standard unless the group can present evidence that refutes this presumptive anticompetitive character. Under this approach, in assessing a claim that a particular group boycott violates the Sherman Act, courts would require the group boycotters to overcome a strong presumption that their boycott violates the Congressional policy of full and fair competition. However, if the group can refute the presumption and the assertions that their boycott will have a detrimental effect on the competitive process, the activity should be evaluated under the rule of reason.

In *Northwest Wholesale*, the plaintiffs would only have been required to present a plausible showing of anticompetitive effects or animus. The defendants, asserting that their boycott should not be held invalid per se, would then have been given the opportunity—and the burden—to refute the plausibility of the plaintiff’s assertions. If this particular group boycott was one that was capable of enhancing competition, it could have been removed from the rigid per se rule and analyzed under the more flexible rule of reason standard. However, if the plaintiffs have a plausible explanation of the group’s activity which involves a violation of the Sherman Act, the case would not have been removed to the rule of reason merely because the boycotted plaintiffs were unable to confirm the likelihood of anticompetitive consequences in their particular case. By modifying the analysis *without discarding the underlying presumptions*, the benefits of the per se rule would have been preserved.

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178. *Id.*

179. *Id.* at 2620.

180. *See id.* at 2620–21.

181. *See supra* notes 177–78 and accompanying text.

182. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2615 (1985).

Whether Northwest Wholesale could have met the burden of refuting Pacific Stationery's assertions is unclear. It is possible that they could not have, and that their activity should have been found to be a group boycott warranting per se analysis.<sup>183</sup> But even if the group boycott were determined to be one normally violative of the Sherman Act, Northwest Wholesale could assert that this activity was insulated from the normally applicable per se rule because of a mandate for self-regulation. This mandate could be required by the structure of the industry or embodied in the Robinson-Patman Act's exemption for cooperative profit distribution.<sup>184</sup> The due process requirement of *Silver* would then become relevant.

#### IV. THE ROLE OF PROCEDURAL SAFEGUARDS IN THE ANTITRUST ANALYSIS OF INDUSTRY SELF-REGULATION

##### A. Self-Regulatory Mandates and the Need for Due Process

Under *Silver*, when there is a mandate, legislative or otherwise,<sup>185</sup> for industry self-regulation, collective activity pursuant to the mandate and designed to further the policy justifying the mandate should be evaluated under the rule of reason if procedural safeguards are provided.<sup>186</sup> The procedural safeguards requirement is unquestionably an innovation of the courts.<sup>187</sup> Such innovations are nonetheless justified and, indeed, required by the flexible phrasing of the Sherman Act.<sup>188</sup> Judicial rules that further the policy of full and fair competition are proper substantive extensions of the Sherman Act.<sup>189</sup>

A due process requirement for mandated self-regulatory activity that otherwise might constitute a group boycott warranting per se invalidation has valuable benefits. First, notice and a hearing provide an antitrust court with a record, allowing it to perform its function more effectively. This record will be especially helpful in conducting a facial examination of the group boycott to determine whether the per se rule is even applicable. Second, procedural requirements compel group actors to act in good faith and within their mandate by requiring the presentation of valid reasons for any potentially anticompetitive activity before the act is done. Third, the procedural requirement may prevent litigation by requiring extra-judicial interaction that can disclose the strengths and weaknesses of the parties' respective positions at an early stage. Fourth, the requirement of a hearing could serve to develop evidence

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183. This Comment suggests only that the analytical framework used by the Court in *Northwest Wholesale* was faulty. Conceivably, the same result would be reached regardless of the framework selected. For example, Northwest Wholesale may have been able to rebut a presumed likelihood of anticompetitive effects by showing market characteristics such as a lack of competitive need for cooperative membership or a lack of cooperative market power. See also Bauer, *supra* note 57, at 699-702 (describing three potential justifications for permitting a group boycott).

184. See *infra* notes 214-20 and accompanying text.

185. See *supra* notes 107-11 and accompanying text.

186. *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); see also *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

187. See, e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2619 (1985) ("[T]he antitrust laws do not themselves impose on joint ventures a requirement of process.").

188. See *supra* notes 39-44 and accompanying text.

189. *Id.*

of an industry practice or custom, while records of past self-regulatory boycotts would function as evidence of the reasonableness of a present act or asserted motivation. Fifth, bringing the parties together for a hearing would help prevent a simple mistake of fact or impression from resulting in potentially harmful self-regulatory activities by the group.

Balanced against these advantages are relatively few disadvantages. The safeguards need not be elaborate, expensive, or time-consuming.<sup>190</sup> The group actors would merely want to create a record of their legitimate purposes and attempt to refute any likelihood of anticompetitive motives or consequences. They would at least want to establish a reasonable link between their self-regulatory activity and a policy underlying the grant of self-regulatory power.<sup>191</sup> Meanwhile, the prospective boycotted party would attempt to dissuade the group from taking the planned action by refuting the justifications advanced by the group. At its conceivably low cost, the requirement of process serves a valuable role in protecting the competitive process when self-regulatory power is conferred on an industry.

#### B. *The Treatment of Procedural Safeguards in Northwest Wholesale*

In *Northwest Wholesale*, the plaintiffs argued that the exercise of self-regulatory power should have been accompanied by such procedural protection.<sup>192</sup> By expelling Pacific from the trade association, Northwest Wholesale denied Pacific the benefits of the form of price discrimination permitted by the Robinson-Patman Act.<sup>193</sup> More importantly, they were acting pursuant to a mandate, inherently required by the nature of trade associations, to create and enforce reasonable rules.<sup>194</sup> Assuming that Northwest Wholesale would have asserted an exemption from the per se rule based on this mandate for self-regulation, the *Silver* due process requirement should be applicable.<sup>195</sup>

In dismissing the argument for procedural safeguards,<sup>196</sup> the Court relied on two assertions.<sup>197</sup> First, the Court distinguished the Robinson-Patman Act from the Securities Exchange Act that had been involved in *Silver* by noting that the latter had provided a broad mandate for industry self-regulation.<sup>198</sup> Second, the Court made the broad statement that:

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190. See Note, *supra* note 15, at 1509. ("In most cases, the requisite procedural mechanism need not be elaborate; a letter of notice, a standing board of the association, a meeting room, and a stenographer would suffice.")

191. See *id.* at 1505.

192. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2616 (1985).

193. *Id.*

194. As the Court recognized, "Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively." *Id.* at 2620. This is a recognition by the Court of a mandate for self-regulation necessitated by characteristics inherent in the nature of trade cooperatives.

195. By exempting cooperatives from its prohibitions against price discrimination, the Robinson-Patman Act necessarily mandates cooperative self-regulation of profit distribution. This would seem to be the type of legislative mandate for industry self-regulation "or otherwise" that was confronted in *Silver*. See *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971).

196. 105 S. Ct. 2613, 2619 (1985).

197. See *infra* notes 198-99 and accompanying text.

198. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2619 (1985).

In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest's members would amount to a per se violation of Section 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of Section 1, no lack of procedural protections would convert it into a per se violation because the antitrust laws do not themselves impose on joint ventures a requirement of process.<sup>199</sup>

The Court's premise that the *Silver* due process rule applies only if there is a broad statutory mandate is questionable for at least two reasons. First, the breadth of a mandate, along with being difficult to assess, is less important than the effect and impact it has in practice.<sup>200</sup> Protecting full and fair competition warrants a more practical evaluation of the source of self-regulatory power.<sup>201</sup> The Robinson-Patman Act, in granting to cooperatives the right to distribute profits, was intended to benefit small buyers,<sup>202</sup> not to put them at the mercy of trade association regulations. Cooperatives like Northwest Wholesale protect the interests of small buyers from the power of huge, mass buyers.<sup>203</sup> Implicit in the exemption from the price discrimination provisions of the Robinson-Patman Act is a mandate to regulate the receipt of profits<sup>204</sup> and, hence, a competitive advantage.<sup>205</sup> However, it is unlikely that Congress conferred this power intending to allow for its misuse.<sup>206</sup> Regardless of the breadth of the self-regulatory power, it can be used to accomplish anticompetitive results that otherwise would be violations of the Sherman Act. If Northwest uses its power to distribute profits as a weapon to serve anticompetitive motivations or

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199. *Id.* at 2619.

200. The requirement of a broad mandate seems misplaced in light of the fact that Pacific Stationery was not necessarily claiming that the exemption for cooperative profit distribution was the only source for a self-regulatory mandate. *See supra* note 141. The alleged violation was the expulsion of Pacific Stationery from the cooperative under self-regulatory powers. These regulatory powers are both necessitated by industry structure and sanctioned by the Robinson-Patman Act. The Court should not have confined its analysis to the statutory sources of the powers.

Indeed, as the Court noted, "[w]holesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively." 105 S. Ct. 2613, 2620 (1985). The mandate for self-regulation obviously is based in industry structure above and beyond the "narrow immunity" of the Robinson-Patman Act.

201. As the Court noted in *NCAA v. Board of Regents of the Univ. of Okla.*: "Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition." 468 U.S. 85, 104 (1984). This seems to require a practical evaluation of the likely effects, rather than sources, of an allegedly anticompetitive activity. *See also* *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958).

202. III E. KINTNER AND J. BAUER, *supra* note 116, at § 19.14.

203. *Id.*

204. The Robinson-Patman Act simply frees cooperatives from its prohibitions against price discrimination. *See* 15 U.S.C. § 13b (1982). In order to benefit from this provision, a party must maintain its membership in a cooperative, yet control of a party's membership status is generally exercised by the cooperative under state law. *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393, 1400 (9th Cir. 1983) (Norris, C.J., dissenting). In Northwest Wholesale's case, an Oregon statute gives cooperatives great freedom in the regulation of membership, saying: "Bylaws may provide for [the] termination of membership and the conditions and terms thereof." Or. Rev. Stat. § 62.145(3)(1984).

205. As the Circuit Court stated, "Excluding Pacific from enjoyment of such benefits may not be calculated to put it out of business, but it must 'impair [its] ability to compete with the conspirators.'" 715 F.2d 1393, 1397 (1983) (quoting from *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 77 (9th Cir. 1969)).

206. This is indicated by the narrowness of the immunity. *See* III E. KINTNER AND J. BAUER, *supra* note 116, at § 19.14 ("The cooperatives exemption is limited to allowing a cooperative association to return to its members a pro rata share of the savings effectuated by group buying or selling. In all other respects, cooperatives remain subject to the Robinson-Patman Act."). *See also* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2618 (1985) ("Section 4 of the Robinson-Patman Act . . . is no more than a narrow immunity from the price discrimination prohibitions of the Robinson-Patman Act itself.").

achieve anticompetitive results, a lack of perceived breadth in the self-regulatory mandate should not prevent the application of the *Silver* rule.

Second, and more significantly, the *Silver* opinion itself requires procedural safeguards if there is a legislative mandate "or otherwise"<sup>207</sup> conferring self-regulatory power.<sup>208</sup> Underlying this standard is a recognition that the source of the mandate is irrelevant in determining whether procedural safeguards should be required. Invariably, a mandate for self-regulation will be justified on the basis of industry structure.<sup>209</sup> Whether Congress has had occasion to embody the structural need for self-regulation in a broad statutory mandate should not be relevant in assessing the need for process. The Court, in *Northwest Wholesale*, recognized that "[w]holesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively."<sup>210</sup> Thus, the need for self-regulation is inherent in the nature of the industry. However, in determining the need for procedural safeguards, the Court confined its analysis of the mandate to the portion which was embodied in the Robinson-Patman Act.<sup>211</sup> Not only did this analysis fail to account for the real breadth of the self-regulatory mandate, but it also failed to account for all of the characteristics giving rise to an actual need for procedural safeguards.

The Court's closing assertion that procedural safeguards can "in no sense determine the antitrust analysis"<sup>212</sup> is equally questionable. While it is true that procedural safeguards *by themselves* are never going to save a per se violation of the Sherman Act,<sup>213</sup> they should have a role in the antitrust analysis of industry self-regulation. Assuming that the Court had found a group boycott normally warranting application of the per se rule, the procedural safeguards would be relevant in assessing the reasonableness of the trade association's assertions that their self-regulatory activities were consistent with the scope of their mandate for self-regulation.<sup>214</sup> Thus, the presence of safeguards does not determine whether the

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207. See *supra* notes 107-11 and accompanying text.

208. See *supra* notes 104-06 and accompanying text.

209. For example, even in *Silver*, where the mandate was broadly embodied in the Securities Exchange Act, the Court's analysis of the mandate was guided by "a consideration of both the economic role played by exchanges and the historic setting of the Act." *Silver v. New York Stock Exch.*, 373 U.S. 341, 349 (1963). It is difficult to conceive of a situation in which a statutory mandate, whether implied or express, could not be equally justified by underlying structural characteristics of the industry. Thus, it is difficult to discern any real distinction between mandates embodied in statutes and those derived from the needs of a particular industry.

210. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2620 (1985).

211. After finding that the Robinson-Patman Act did not embody a broad Congressional mandate for industry self-regulation, the Court decided that "[n]o need exists, therefore, to narrow the Sherman Act in order to accommodate any competing congressional policy requiring discretionary self-policing." 105 S. Ct. 2613, 2619 (1985) (emphasis added). This ignores the possibility that the *Silver* due process requirement might apply to mandates for self-regulation under the "or otherwise" language of the *Silver* opinion.

212. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2619 (1985).

213. Procedural safeguards are only relevant in the antitrust analysis of a group boycott after two other circumstances have been shown to be present. See *infra* note 214.

214. Assuming that the likelihood of anticompetitive consequences is based on the denial of a share of profits for Pacific, the argument of a party in the position of Northwest Wholesale to remove the expulsion from the per se rule would assert that: (1) the Robinson-Patman Act and the nature of trade associations warrant both self-regulation of membership and the distribution of profits thereto, (2) the expulsion of Pacific is reasonably-related and narrowly-tailored to accomplish an end consistent with the policies underlying their self-regulatory power, and (3) procedural safeguards were provided. See *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

act is a group boycott warranting per se analysis, but it is relevant in the assessment of whether exempting the boycott from that analysis is reasonable.<sup>215</sup>

### C. A More Appropriate Role for Procedural Safeguards

If the preliminary analysis had found that, absent the Robinson-Patman Act, the expulsion of Pacific Stationery and the resulting denial of trade association relationships would amount to a group boycott warranting per se analysis, an effort by Northwest Wholesale to justify the activity in light of the Robinson-Patman Act would bring the *Silver* decision into play.<sup>216</sup> Aside from its requirement of procedure, *Silver* requires that collective activity under a grant of self-regulatory power be intended to accomplish an end consistent with the policy underlying the grant of power,<sup>217</sup> that it be reasonably related to this end,<sup>218</sup> and that it be no more extensive than necessary in its intrusion on the antitrust laws.<sup>219</sup> In the context of *Northwest Wholesale*, such analysis would focus on whether the stock disclosure rule was intended to further the effective functioning of cooperatives, whether the rule was reasonably related to this policy, and whether the expulsion was excessive in light of the Congressional concern for full and fair competition.

The due process rule is imposed to help the courts make this analysis and guard against arbitrary or anticompetitive activities by the cooperative.<sup>220</sup> With such a record, a court could find indicators of the cooperative's motives, the circumstances relevant to an assessment of reasonableness, and evidence of good faith efforts by the cooperative to minimize any conceivable anticompetitive effects. The record would also serve to preserve and establish evidence of an industry practice or custom. A lack of a hearing or explanation will leave the record potentially devoid of evidence of actual intent, purpose, and reasonability. Therefore, regardless of the breadth of any statutory embodiments of an inherent need for industry self-regulation, procedural safeguards should be required whenever mandated self-regulation might otherwise constitute an illegal group boycott.

### D. Another Context for Procedural Safeguards: The Rule of Reason

Having found that the group boycott in *Northwest Wholesale* was not one warranting per se analysis, the Court remanded the case for a review of the District Court's rule of reason analysis.<sup>221</sup> Implicit in this holding is the belief that the expulsion was not an activity that can be found voidable without further inquiry. When a threshold analysis finds that a group boycott does not warrant the per se rule,

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215. *Id.*

216. *See, e.g., Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393, 1397 (9th Cir. 1983), *rev'd*, 105 S. Ct. 2613 (1985).

217. *Id. See Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971).

218. *Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc.*, 715 F.2d 1393, 1397 (9th Cir. 1983).

219. *Id.*

220. *Silver v. New York Stock Exch.*, 373 U.S. 341, 361-63 (1963).

221. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2621-22 (1985).

the rule of reason test is employed.<sup>222</sup> In this situation, the analysis will no longer focus on the existence and scope of a mandate for industry self-regulation and the provision of procedural safeguards will no longer be required.<sup>223</sup> The presence or absence of procedural safeguards, however, may be relevant to this analysis. The rule of reason standard evaluates the capacity of an activity to "suppress or even destroy competition,"<sup>224</sup> and the facts relevant to such an inquiry are numerous.<sup>225</sup> Evidence of the intent and purpose of the parties is relevant to assist the court in assessing facts and predicting consequences.<sup>226</sup> When industry self-regulation involves the exclusion of competitors from access to relationships or the receipt of benefits relevant to full and fair competition and market efficiency, the denial of a hearing or explanation may be probative into the concern of the group with using its powers in good faith. Conversely, the presence of a hearing or explanation will indicate a willingness by the group to avoid arbitrariness. Additionally, a record of a hearing will be of great assistance to a court in determining the motives and reasonability of the parties and their actions.<sup>227</sup> The low cost and ease of providing procedural protections makes their presence even more indicative of reasonableness.<sup>228</sup> Therefore, even in a review of a self-regulatory group boycott that does not depend on a mandate for self-regulatory power to escape per se invalidation, the presence of procedural safeguards is relevant to antitrust analysis.

## V. CONCLUSION

The Sherman Act's concern with preserving full and fair competition requires that courts diligently maintain and develop an antitrust paradigm suited to the contemporary marketplace.<sup>229</sup> Business associations like Northwest Wholesale are often given a quasi-governmental role in our economy, as it sometimes becomes necessary and efficient to allocate to these institutions a measure of self-regulatory power. When an industry's nature requires the recognition of a mandate for self-regulation, whether the mandate is embodied in a statute or not, the industry does not acquire the right to misuse the power in derogation of competition.<sup>230</sup> Thus, while Northwest Wholesale has the power to engage in a self-regulatory group boycott that might otherwise constitute a per se violation of the antitrust laws,<sup>231</sup> it should not have the right to conduct its boycott in an unreasonable manner. The mandated self-regulatory activity of the industry should be removed from per se analysis only when the activity is the type of activity that was perceived as the procompetitive justification for the grant of power.<sup>232</sup>

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222. See generally I E. KINTNER, *supra* note 31, at §§ 8.2-.3; H. HOVENKAMP, *supra* note 4, at § 4.4.

223. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2621-22 (1985).

224. *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

225. I E. KINTNER, *supra* note 31, at § 8.3.

226. *Id.* at §§ 8.2-.3.

227. See *supra* notes 185-91 and accompanying text.

228. See Note, *supra* note 15.

229. See *supra* notes 43-44 and accompanying text.

230. See *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

231. See *supra* notes 216-20 and accompanying text.

232. See *supra* notes 104-11 and accompanying text.

An effective means for ensuring that collective actors adhere in good faith to the goals of the mandate of their self-regulatory power is the requirement of procedural safeguards in the use of the power. Thus, a group that argues that its group boycott should be exempted from the per se rule against group boycotts should be required to show one of two situations. First, during a threshold analysis of the group boycott, the group could assert that circumstances are such that the presumed likelihood of anticompetitive consequences is inapplicable. The burden should be on the group to overcome this presumption in a preliminary review by a court. Second, even if per se analysis would normally be appropriate, the group could assert that the boycott was imposed reasonably and not excessively in furtherance of a goal underlying a grant, legislative or otherwise, of self-regulatory power. Here, the group must also show that it extended procedural protections in a good faith effort to avoid arbitrariness and to maximize full and fair competition.

When the group successfully demonstrates in the threshold analysis that the per se rule should not be applicable, the rule of reason inquiry will follow. The presence or absence of procedural safeguards also should be relevant in this analysis. In both contexts, the presence of process guards against a misuse or arbitrary use of industrial self-regulatory power, supporting any group argument that it has made a good faith effort to preserve full and fair competition. Requiring such a safeguard will help enhance the effectiveness of the antitrust laws when self-regulatory power is conferred upon an industry.

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